# Discrimination in Employment Related to Criminal Records The Jurisdiction of the Human Rights

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by Israel Foulon LLP

The Human Rights Code (the "Code") in Ontario prohibits discrimination in employment on the grounds of a person's "record of offences" as defined in section 10(1) of the Code. The protection under this ground applies to persons

who have been convicted of an offence and obtained a pardon, which has not been revoked, or to persons who have been convicted of a provincial offence.

TRIBUNAL OF ONTARIO

The Human Rights Tribunal of Ontario (the "Tribunal") has recently released a number of cases following its decision in de Pelham v. Mytrak Health Systems1 ("de Pelham"), in which the Tribunal concluded that it does not have jurisdiction to protect against discrimination in employment on the ground of "record of offences" in circumstances when a person has been charged but has not yet been convicted. In de Pelham, the Applicant alleged that his employment was terminated when his employer became aware that criminal charges were pending against him. The Applicant argued that the Legislature could not have intended for the Code to provide greater protection for persons convicted than persons charged who have yet to be proven guilty. He claimed that his dismissal was a violation of the Code and constituted discrimination on the ground of "record of offences". However, the Tribunal did not accept this argument and held that it was not prepared to depart from the clear and unambiguous wording of the definition of "record of offences" in the Code, which clearly only protects individuals who have been convicted of an offence and obtained a pardon that has not been revoked. The jurisprudence following de Pelham supports that the Tribunal will only make a finding of discrimination in employment on the ground of "record of offences" when the circumstances fit within the precise definition.

Following this line of reasoning, the Tribunal applied a strict reading of the provision of the Code in Lawrence v. Toronto Police Service Board3 and in McKenzie v. Ontario (Government Services)4 ("Lawrence"), concluding that the ground "record of offences" did not provide protection against discrimination in employment when a criminal charge was withdrawn or discharged. In those circumstances, a pardon is not available and discrimination is not prohibited by the Code. The Tribunal did not accept the Applicant's argument in Lawrence that the Crown's decision to withdraw charges is akin to a pardon and warrants the same protection. The Tribunal dismissed the Application.

It should be noted that when the Tribunal makes a positive finding of discrimination in employment on the basis of "record of offences", as it did in Dubé v. CTS Canadian Career College, the damages may be significant. The Applicant, Dubé, was convicted and served a prison sentence for armed robbery and manslaughter while struggling with addiction as a young adult. Since that time, he devoted a significant part of his life to advocating on behalf of people with addictions who were serving time in prison, and he published an autobiography to document his experiences in prison. Dubé received a pardon for his offences in 2006.

Dubé applied for a position as an Addiction Interventions Instructor at CTS Canadian Career College (the "College") which involved teaching addiction counseling students. The College rescinded a verbal job offer when it discovered his criminal past, stating that he failed to disclose pertinent information in his interview.

The Tribunal indicated that the purpose of prohibiting discrimination in employment on the basis of "record of offences" is to remove the indefinite social stigma attached to past criminal acts so that persons are not excluded from entering and participating in the labour market. The Tribunal found that rescinding the offer of employment on the basis of Dubé's criminal past was discriminatory, and in the absence of a bona fide occupational qualification requiring no convictions, the College had no justifiable response for its decision. The Tribunal held that Dubé was under no obligation to disclose his criminal history to the College.

The Tribunal awarded Dubé $15,000 to compensate him for injury to his dignity, feelings and self-respect and $24,275 for loss of employment income. The Tribunal also ordered the College to produce a plan for implementing future compliance with the Code.

When employment is terminated without cause for reasons related to criminal charges or a conviction that does not fall within the definition of "record of offences" as defined in the Code, the Tribunal does not have jurisdiction to hear the Application for discrimination in employment. While a matter in these circumstances will not succeed at the Tribunal, this does not save the employer from being subject to a claim for wrongful dismissal in a civil proceeding. A claim for wrongful dismissal is not barred from being commenced as a civil proceeding after the matter is disposed of for lack of jurisdiction at the Tribunal.

**EMPLOYER TIPS**

Hiring Decisions or Changes to Employment Status
Confirm the following before acting:
If you learn that the employee has been convicted of a federal offence and a pardon was granted and has not been revoked or the offence for which the employee was convicted is a provincial offence (i.e. Highway Traffic Act offence), be aware that a refusal to hire or a change in the employment status of the employee for reasons of "record of offences" is considered discrimination in employment under section 5(1) of the Code. In exceptional circumstances, discrimination of this nature is justifiable, but only if the employer can demonstrate that the decision is based on a bona fide occupational

qualification of the job. For instance, a school bus driver who has multiple serious driving offences may be refused employment due to the nature of the offences.

**Interview Tips**

Acceptable questions
1. Has the applicant been convicted of a criminal offence for which a pardon has not been granted?
2. Is the applicant bondable (ask this question only if being bondable is a bona fide requirement of the job)?
3. Does the applicant have a driver's license (ask this question only if having a license is an essential requirement of the job)?

It is acceptable to undertake a criminal background check on existing or potential employees.

**What not to ask during an interview**

1. Has the applicant ever been arrested or convicted?
2. Has the applicant spent time in jail or does he/she have a criminal record?
3. Has the applicant been convicted under a provincial statute (i.e. Highway Traffic Act)?
4. Has the applicant been convicted of an offence for which a pardon has been granted?

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